The reach and efficacy of s 121 of the Family Law Act

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The two most important manifestations of open justice are that the doors of the courts are open to members of the public and that what is seen and heard in the courtroom can be reported to the public at large by those who choose to attend. Section 121 of the Family Law Act 1975 (Cth) qualifies the second manifestation of open justice – the right to report – by prohibiting the publication or dissemination of any information that would identify participants in proceedings under the Family Law Act. This article examines s 121 from an operational perspective with a view to evaluating its reach and its efficacy, particularly in this electronic era when anyone can be a publisher. After examining s 121 in depth and concluding that the legislation is complex and at times ambiguous, this article recommends that the time may be ripe for an in-depth examination of s 121 with a view to amending the legislation to take account of the internet and its vast and indiscriminate audience.

INTRODUCTION

Open justice is a fundamental tenet of our legal system. It is based on the premise that justice must not only be done but must "manifestly and undoubtedly be seen to be done".[1] There are a number of manifestations of the principle, but the two most vital are that the doors of the courts are open to members of the public and that what is seen and heard in the courtroom can be reported to the public at large by those who choose to attend. The first manifestation relates to access to the proceedings themselves; the latter pertains to "access outside of those proceedings to information about them", whether this information is disseminated "through the media or otherwise".[2]

While open justice is primarily a common law doctrine,[3] its tenets are sometimes reiterated in the legislation that creates a particular court. For example, s 97(1) of the *Family Law Act 1975* (Cth) provides that all proceedings in courts that exercise jurisdiction under the *Family Law Act*[4] (these courts are collectively referred to in this article as "the family courts") "shall be heard in open court". This means that, ordinarily, anyone, including the media, can enter the court and observe the proceedings. In so doing, the attendees will hear the names of the parties, witnesses, associates and any other personal information to which reference is made.

It has always been open to parliaments to curtail the operation of the open justice principle[5] and in the context of family law proceedings it is customary for legislation to either mandate derogations

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[1] *R v Sussex Justices; Ex parte McCarthy* [1924] KB 256, 259 (Lord Hewart CJ).

[2] *Re W: Publication Application* (1997) 137 FLR 205; [1997] FLC 92-756, 84,250.

[3] It is also generally agreed that the principle has constitutional significance.

[4] Throughout Australia – with the exception of Western Australia, which has a State Family Court, and the Northern Territory, where the Supreme Court continues to exercise jurisdiction as no Family Court judge is permanently resident – the Family Court of Australia, the Federal Circuit Court of Australia and, to a very limited extent, courts of summary jurisdiction exercise jurisdiction under the *Family Law Act*. The Family Court of Australia and the Federal Circuit Court of Australia have concurrent jurisdiction in relation to family law matters but the Family Court will generally hear the more complex matters. Western Australia's State Family Court operates under the *Family Court Act 1997* (WA). This Act is virtually identical to the *Family Law Act* and the Court is able to hear all family law matters arising under this legislation or State law.

[5] A parliament's power is subject to constitutional limits. See, eg, *Russell v Russell* (1976) 134 CLR 495; 50 ALJR 594.

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to open justice or to empower judges to make case-specific restrictions.[6] The *Family Law Act* is no exception. After enunciating the general rule that the family courts are open, s 97 proceeds to qualify the first manifestation of open justice by empowering a court exercising jurisdiction under the *Family Law Act* to close itself to all but the parties, their legal representatives and such other persons that the court specifies may be present, or to order that specified persons or classes of persons cannot be present.[7] Such orders can be made of the court's own motion or on the application of a party. No grounds are specified as to the circumstances in which such orders can be made and the authors understand that the power is rarely exercised. Section 121 qualifies the second manifestation of open justice – the right to report – by prohibiting the publication or dissemination of any information that would identify participants in proceedings under the *Family Law Act*.[8] The policy underlying s 121 is to prevent the "prurient reporting that had occurred prior to the passing of the *Family Law Act* in relation to parties who were involved in divorce proceedings",[9] and by this means protect the privacy of those who become embroiled in such proceedings. Conferring privacy protection is designed to:

> ensure that people do not feel discouraged from coming to the court for fear of having their private life made public. The law is also designed to ensure that children are not held up to ridicule, curiosity or notoriety.[10]

In 2013, the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) inserted an additional suite of provisions pertaining to open justice into the *Family Law Act*.[11] Part XIA of the *Family Law Act* confers power on the family courts to make suppression and non-publication orders that prohibit or restrict the publication or other disclosure of:

(a) information tending to reveal the identity of or otherwise concerning any party to or witness in the proceedings or any person who is related to or otherwise associated with any party to or witness in the proceedings;[12] or

(b) information that relates to the proceedings and is information that comprises evidence or information about evidence, information obtained by the process of discovery or produced under a subpoena, or information lodged with or filed in the court.[13]

Such orders can be made only if necessary to: prevent prejudice to the proper administration of justice; prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security; protect the safety of any person; or avoid causing undue distress or embarrassment to a party or witness in criminal proceedings involving a sexual offence (including an act of indecency).[14] Part XIA is expressed not to limit s 121.[15]

The focus of this article is on s 121. However, this article is not concerned to explore the merits (or otherwise) of this section. Rather, the purpose of this article is to evaluate the provision from an operational perspective with a view to evaluating its reach and its efficacy, particularly in this electronic era when anyone can be a publisher.

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[6] For some historical examples in the family law context see: *Judicial Proceedings (Regulation of Reports) Act 1926* (UK); *Judicial Proceedings Reports Act 1958* (Vic); *Matrimonial Causes Act 1959* (Cth) s 123.

[7] *Family Law Act 1975* (Cth) s 97(2).

[8] Section 243 of the *Family Court Act 1997* (WA) is a similar provision to s 121.

[9] *AH v SS* (2006) 194 FLR 111; 34 FamLR 24; [2005] FamCA 854, [26].

[10] *Western Australian Newspapers Ltd v Cuzens* [2016] FCWA 6, [26]. See also: *Sedgwick v Rickards* [2013] FCWA 52.

[11] The same suite of provisions was also inserted into the statutes that establish or govern the High Court, the Federal Court of Australia and the Federal Circuit Court of Australia. See: *Judiciary Act 1903* (Cth) Pt XAA; *Federal Court of Australia Act 1976* (Cth) Pt VAA; *Federal Circuit Court of Australia Act 1999* (Cth) Pt 6A.

[12] This is in very similar terms to s 121 although "disclosure" is a broader term than "publication".

[13] *Family Law Act 1975* (Cth) s 102PE.

[14] *Family Law Act 1975* (Cth) s 102PF

[15] *Family Law Act 1975* (Cth) s 102PC.

THE PROHIBITIONS IN S 121

Section 121(1) permits the full reporting of proceedings under the *Family Law Act* provided that no persons associated with the proceedings are identified. The precise wording of s 121(1) is as follows:

> A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:
> (a) a party to the proceedings;
> (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
> (c) a witness in the proceedings;
>
> commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

A second prohibition is contained in s 121(2):

> A person who, except as permitted by the applicable Rules of Court,[16] publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means (otherwise than by the display of a notice in the premises of the court), a list of proceedings under this Act, identified by reference to the names of the parties to the proceedings, that are to be dealt with by a court commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

The legislation contains a detailed list of particulars that are deemed sufficient to identify a person to a member of the public or to a member of the section of the public.[17] Section 121(9) contains a list of exceptions to these two prohibitions. An offence against s 121 is an indictable offence.[18] Proceedings for an offence can be commenced only by or with the written consent of the Director of Public Prosecutions.[19] The Family Court does not prosecute or try persons who might be suspected of having contravened s 121. Rather, the Court's approach is to "direct the Marshall of the Court and/or the Australian Federal Police to investigate and take steps to ensure any breach of s 121 of the *Family Law Act* is prosecuted".[20]

THE COMPONENTS OF S 121

This article will investigate the reach and efficacy of s 121 by dividing the prohibition into seven components and considering each one individually. They are: Who cannot be identified? What constitutes identifying information? What is a "proceeding"? When is an account of proceedings regarded as having been published or disseminated to the public? What is an "account of proceedings"? How long does the prohibition in s 121 persist? What are the exceptions to the prohibition? There are also issues pertaining to the mechanisms by which s 121 can be enforced and who can be held liable for a breach, but a discussion of these is beyond the scope of this article.[21]

Who cannot be identified?

Section 121(1) prohibits the following people from being identified in an account of a proceeding:

- a party or witness in the proceedings;
- a person who is related to, or associated with, a party to the proceedings; or
- a person who is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate.

[16] Applicable Rules of Court made for the purposes of s 121(2) may be of general or specially limited application or may differ according to differences in time, locality, place or circumstance: *Family Law Act 1975* (Cth) s 121(10).

[17] *Family Law Act 1975* (Cth) s 121(3).The proscribed details are outlined below.

[18] *Family Law Act 1975* (Cth) s 121(5).

[19] *Family Law Act 1975* (Cth) s 121(8).

[20] *Xuarez v Vitela* [2012] FamCA 574, [36]. See also: *Prentice v Bellas* (2012) 47 Fam LR 262; [2012] FamCA 108, [55].

[21] The enforcement issues are complex and merit separate treatment. They involve matters such as: which courts can hear a prosecution for a breach of s 121; whether injunctions lie to prevent continuing breaches of s 121; whether a violation of s 121 can be punished as a contempt of court rather than as a statutory offence; and who in the chain of publication can be held liable as a publisher.

The provision is obviously wide enough to cover the children whose parents are parties to proceedings under the *Family Law Act*. Indeed, children would undoubtedly have been uppermost in the minds of those responsible for enacting the provision. The reference to witnesses would extend to independent expert witnesses, such as family consultants, psychiatrists, psychologists, social workers and family report writers.[22] It is unlikely that the prohibition in s 121(1) extends to the solicitors, barristers and the independent children's lawyers who appear in family law cases and the judges who preside over these cases. While these persons might, on one view, be regarded as either "associated with" a party or "in any other way concerned in the matter",[23] it is suggested that such a wide interpretation of s 121(1) is both unnecessary, since their personal privacy is not at stake, and inappropriate, as identifying lawyers and judges is essential for the court's transparency and accountability. Indeed, these persons are all routinely named in judgments that appear on the family courts' websites and on AustLII.[24]

What constitutes identifying information?

Section 121(3) states:

> Without limiting the generality of subsection (1), an account of proceedings, or of any part of proceedings … shall be taken to identify a person if:
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> (a) it contains any particulars of:
>
> (i) the name, title, pseudonym or alias of the person;
>
> (ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;
>
> (iii) the physical description or the style of dress of the person;
>
> (iv) any employment or occupation engaged in, profession practised or calling pursued, by the person or any official or honorary position held by the person;
>
> (v) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;
>
> (vi) the recreational interests, or the political, philosophical or religious beliefs or interests, of the person; or
>
> (vii) any real or personal property in which the person has an interest or with which the person is otherwise associated;
>
> being particulars that are sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires;
>
> (b) in the case of a written or televised account or an account by other electronic means-it is accompanied by a picture of the person; or
>
> (c) in the case of a broadcast or televised account or an account by other electronic means-it is spoken in whole or in part by the person and the person's voice is sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires.[25]

These prescriptive guidelines are so wide-ranging that reporters who attend family court proceedings and who wish to write or relay an account of what transpired there must be very careful when deciding what details to include in the account. They must write or speak in generalities and ensure that their reports are "clinically devoid of any personal reference",[26] as the section is breached even if the published details are sufficient to identify the party, witness or associated person to a single

[22] See, eg, *AH v SS* (2006) 194 FLR 111; 34 FamLR 24; [2005] FamCA 854. Expert witnesses are not named in judgments.

[23] In *Xuarez v Vitela* [2012] FamCA 574, [53] Forrest J observed that the father had identified a number of persons on his website, including the barristers and solicitors involved in the proceeding in question, and concluded that in so doing he had contravened s 121. However, His Honour's real concern appeared to be that the website identified the parties and there was no direct discussion about whether legal representatives come within the purview of the prohibition.

[24] Of course it would be open to a family court to make an order prohibiting publication of the names of lawyers and judges in a given case under Pt XIA of the *Family Law Act*. Perhaps this might be done if the evidence established that the security of a lawyer or judge was at risk.

[25] This last form of identification was considered in *Re South Australian Telecasters Ltd* (1998) 23 Fam LR 692.

[26] CCH, *Australian Family Law & Practice Premium Commentary* (subscription service) [54-545].

member of the public. Compliance may make "the style and composition both difficult for the ordinary reporters to write and somewhat difficult for ordinary newspaper readers to adapt to".[27] The anonymity which s 121 seeks to protect may also make anonymised judgments less intelligible, as the following extract from a recent decision of the Federal Circuit Court illustrates:

> She deposed that the father's supervised contact sessions at the [omitted] Children's Contact Service was suspended. … The child X had been *"increasingly settled since June 2014"*. Y has been *"developing well"*. At a meeting with the Director, Ms H … thought that the children felt comfortable with their [nationality omitted] identity and the fact that they identify as [religion omitted].[28]

What are "proceedings"?

Section 121(1) applies only to accounts of "proceedings". "Proceedings" is defined to mean "a proceeding in a court, whether between parties or not", and includes cross-proceedings (eg if the husband makes an application for property settlement and the wife cross-applies for spousal maintenance) or an incidental proceeding (eg an application in respect of payment of a party's costs for the issuing of subpoenas related to the proceedings) "in the course of or in connexion with a proceeding".[29] A court, "in relation to any proceedings, means the court exercising jurisdiction in those proceedings by virtue of this Act".[30] In *R v Howe*,[31] the Full Court of the Supreme Court of South Australia held that these definitions are respectively confined to proceedings under the *Family Law Act* and to courts exercising jurisdiction under the *Family Law Act*. Nevertheless, these definitions apply only "unless the contrary intention appears", and the Court proceeded to hold that in relation to the exception then contained in s 121(5)(a) – currently contained in s 121(9)(a) – the contrary intention did otherwise appear. This finding, and its context, is explained at greater length below in the discussion of s 121(9)(a).

Non-court-based family services, such as family counselling and family dispute resolution procedures, are not "proceedings" and thus are not subject to the prohibitions in s 121. However, these services are subject to specific confidentiality provisions and any communications made under these conditions cannot be disclosed to third parties and, subject to certain exceptions, are not admissible as evidence in court.[32] Nevertheless, disputes regarding the disclosure and admissibility of such communications have come before the family courts and if they do so are subject to the constraints of s 121.[33]

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[27] CCH, n 26.

[28] *Pillai v Pillai (No 3)* [2016] FCCA 128, [47]–[51]. The authors understand that the Federal Circuit Court uses a computer program to anonymise its cases, rather than employ staff to do so manually, and this may have exacerbated the problem. This is discussed further below.

[29] *Family Law Act 1975* (Cth) s 4(1).

[30] *Family Law Act 1975* (Cth) s 4(1). The High Court appears to be in a different position vis a vis s 121, as evidenced by its use of the actual names of the parties in its judgment in *Kennon v Spry* (2008) 238 CLR 366; 1 ASTLR 271; 83 ALJR 145; [2008] HCA 56. Presumably this is due to the fact that the High Court's appellate jurisdiction is sourced in s 73(i) of the Commonwealth *Constitution*, thus the Court is not exercising jurisdiction "by virtue of this Act". However it is understood that in recent years the High Court has used the pseudonyms assigned by the Family Court when dealing with appeals from that Court. See, eg, *Stanford v Stanford* (2012) 247 CLR 108; 87 ALJR 74; [2012] HCA 52.

[31] *R v Howe* (1978) 19 SASR 303; 34 FLR 440; 4 Fam LR 166.

[32] *Family Law Act 1975* (Cth) ss 10D, 10E (counselling) and ss 10H, 10J (family dispute resolution). A counsellor or dispute resolution practitioner must disclose a communication if he or she reasonably believes the disclosure is necessary for the purpose of complying with a Commonwealth, State or Territory law: ss 10D(2) and 10H(2). Parties over 18 may consent to the disclosure of communications which they, or a child under 18 for whom they have parental responsibility, have made: ss 10(D)(3) and 10H(3). Even if there is no consent to disclosure, communications may be revealed where this is necessary to protect a child, a person or property from harm, or to assist an Independent Children's Lawyer: ss 10D(4) and 10H(4). Even when a communication may or must be disclosed, this does not render it admissible in court: ss 10D(6) and 10H(7). Only those admissions by adults or children indicating that a child has been abused or is at risk of abuse are admissible and even then only if the court is satisfied that there is insufficient evidence available from other sources: ss 10E(2) and 10J(2).

[33] See, eg: *Unitingcare-Unifam Counselling and Mediation v Harkiss* (2011) 252 FLR 309; [2011] FamCAFC 159 and *Degraves v Searle* [2013] FCCA 660. See generally: Donna Cooper, "Inconsistencies In and the Inadequacies of the Family

The vast majority of proceedings under the *Family Law Act* relate to breakdown of relationships and the issues that need to be resolved when that occurs; namely, divorce, property division, spousal maintenance, child maintenance, the care of children and child support.[34] Section 121 is clearly aimed at conferring privacy protection on those involved in such proceedings. However, the family courts are also given power to punish for contempt and to fine or imprison contemnors,[35] and it seems that contempt proceedings would also be subject to s 121, with the result that the contemnor cannot be identified. It is unclear whether the framers of the *Family Law Act* intended s 121 to apply to criminal proceedings where the liberty of the subject is at stake.[36]

What means of communication are subject to the prohibition? What does it mean to "publish" or "disseminate"?

Section 121 is worded in such a way that it catches people who "publish" or "otherwise disseminate" the proscribed information to the public or a section of the public. The communication must occur via one of the four means listed in the section. In the case of publication, they are: "in a newspaper or periodical publication", "by radio broadcast or television" or "by other electronic means";[37] in the case of dissemination, "by any means".

"Publish" and "disseminate"

The *Family Law Act* does not contain a definition of "publish" or "disseminate" for the purposes of s 121.[38] Although the concept of "publication" is construed very narrowly in the defamation context,[39] its ordinary meaning generally entails a transmission of information to the public or a section thereof[40] and there are clear indications in both the text and purpose of s 121 that a wide distribution is contemplated. Newspapers, radio and television are all instruments of mass communication and the phrase "*otherwise* disseminated to the public or a section of the public" affirms that the preceding three communications are so directed. This was affirmed in *Re Edelsten; Ex parte Donnelly*, where the phrase "disseminates to the public" was held to refer to "widespread communication with the aim of reaching a wide audience".[41] Each of the four means of communication listed in s 121(1) will now be explored.

Counselling and FDR Confidentiality and Admissibility Provisions: The Need for Reform" (2014) 4 Fam L Rev 213, where the author suggests that amendments be made to the confidentiality provisions so as to provide litigants with greater protection from harm.

[34] Section 99 of the *Child Support Assessment Act 1989* (Cth) confers jurisdiction on the family courts to exercise jurisdiction under this legislation. Section 100 specifically states that the *Family Law Act* and Rules will apply to proceedings under the *Child Support Assessment Act 1989*. Section 110X of the *Child Support (Registration and Collection) Act 1988* (Cth) imposes restrictions on the publication of review proceedings before the AAT in similar terms to s 121 of the *Family Law Act*.

[35] *Family Law Act 1975* (Cth) s 112AP. The Family Court is given the same power to punish contempts of its power and authority as the High Court possesses in respect of contempts of the High Court: *Family Law Act 1975* (Cth) s 35. The same is true of the Federal Circuit Court: *Federal Circuit Court of Australia Act 1999* (Cth) s 17. For examples of contempt proceedings in the family law context, see: *Ascot Investments Pty Ltd v Harper (No 3)* [1982] FLC 91-253; *In Marriage of Trnka* (1984) 10 Fam LR 213; [1984] FLC 91-535; *Bank v Coleiro* (2011) 252 FLR 359; [2011] FamCAFC 157; *Rossi v Commissioner of Police* [2011] FamCAFC 162; *Faukland v Shikia* (2016) 308 FLR 56; [2016] FamCAFC 83.

[36] CCH, n 26, [54-545].

[37] "Other" must be taken to mean other than publication by radio broadcast or television, which are also forms of electronic communication.

[38] Section 102P contains a definition of "publish" but it applies only to suppression orders made under Pt XIV. In that context, "publish" means "disseminate or provide access to the public or a section of the public by any means, including by publication in a book, newspaper, magazine or other written publication; broadcast by radio or television; public exhibition; or broadcast or publication by means of the internet".

[39] In defamation law, publication occurs if defamatory matter is communicated to anyone other than the plaintiff. Accordingly, communication to one person can constitute a publication.

[40] In *Police v Slater* (unreported, New Zealand District Court, Harvey J, CRN 004028329 – 9833, 14 September 2010), Harvey J held that in ordinary parlance "[t]he concepts of announcing and making that announcement to a wider audience are present" ([16]) and applied this concept to the word "publish" in a legislative provision curtailing open justice.

[41] *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434. The case was cited with approval in *Waldman v Waldman* [2013] FCCA 1035, [12].

Publication in a newspaper or periodical publication; publication by radio broadcast or television

These two types of communication relate to the mass media and are self-explanatory. Pearson and Polden caution that:

> given the obsession with celebrity in the modern media, journalists should beware of breaching these provisions in places they might least expect it, such as gossip columns, breakfast radio chat shows and entertainment television segments where they might be tempted to report upon the Family Court outcomes of famous people.[42]

Publication by "other electronic means"

The third type of communication – publication by "other electronic means" – was inserted in 2000[43] to cover "all forms of electronic means in order to cover current forms of dissemination of information".[44] "Electronic means" is defined to include publications "in the form of data, text or images by means of guided and/or unguided electromagnetic energy" or publications "in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system".[45] Presumably, this definition would potentially include online communications via websites and blogs, emails, forms of social media (such as Facebook, Twitter and Instagram) and mobile phone texts, notwithstanding that some of these mediums of communication did not exist in 2000. These technologies have created a minefield of challenges for controlling and enforcing the publication of information that identifies parties or witnesses etc to family law proceedings. They include the speed and ease with which information is disseminated through the internet and the fact that individual citizens now have the same means to infringe s 121 as the mass media, yet are far less likely to be aware of the constraints imposed by s 121.[46] However, the communication of prohibited identifiers via one of these electronic means will breach s 121 only if the information is "published", which, as suggested above, contemplates a wide audience. This makes it necessary to consider specific types of electronic communication in greater detail.

Websites and blog sites

Whether a person who places prohibited identifiers on a website that can be accessed by anyone in the world with a computer and an internet connection has published the material "by other electronic means" will depend on whether the material need only be accessible to the public or whether it must have *actually* been accessed. Unlike material contained in newspapers and periodical publications or material broadcast on radio and television, which is certain to have been read, watched or heard by someone, in the online realm it is possible that a website containing the prohibited identifiers might be accessible to the world and yet not have been accessed by anyone. In the defamation context, "publication" has occurred in the online realm only if the material is actually downloaded.[47] By contrast, in the context of sub-judice contempt law, courts have held that the objectionable material need only be accessible; thus the material is published when it is uploaded.[48]

It is suggested that breach of a statutory prohibition such as s 121 is more akin to contempt law than to defamation law and that mere accessibility of the proscribed particulars will suffice. Several cases contain indications that this is the view taken by the courts. For example, in *Police v Slater*, the

[42] Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law* (Allen and Unwin, 5th ed, 2015) 195.

[43] *Family Law Amendment Act 2000* (Cth) s 100.

[44] Explanatory Memorandum, *Family Law Amendment Bill 1999* (Cth) Item 100.

[45] *Family Law Act 1975* (Cth) s 121(11).

[46] See, eg, Jason Walker, "#social media#children#family law#issues" (Paper presented at the 17th National Family Law Conference, Melbourne, 18–21 October 2016) for a discussion of some of the issues which have arisen in the family courts as a result of the ever increasing use of social media.

[47] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575; 77 ALJR 255; [2002] HCA 56.

[48] *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248; 211 A Crim R 292; [2010] VSCA 51; *R v Hinch* [2013] VSC 520, [53]; *R v Johnson* [2016] VSC 699, [24].

New Zealand District Court had no hesitation in concluding that, conceptually:

> a blog is no different from any other form of mass media communication especially since it involves the internet which anyone who has an internet connection is able to access. It fulfils the concept of publishing and publication. It makes information available to a wider audience. That is why people blog.[49]

While he did not deal with the issue in detail, in *Xuarez v Vitela*, Forrest J appeared to regard material posted on a website as published for the purposes of s 121. His Honour said of the material in question in that case:

> It is published on the internet and remains published and thereby available for any person, anywhere in the world, to access it quickly and easily at any time of the day or night on an ongoing basis. Publication on the internet is quite different to one off publication in a television or radio program or in a newspaper article where the publication is limited in time and place. I am satisfied that continuous publication on the internet of material that offends the section and impacts upon the welfare of children who are subject to the jurisdiction of the Court is able to be restrained by injunction …[50]

The position might be otherwise if access to the blog is restricted.[51]

Facebook, Twitter and Instagram etc

Disgruntled family law litigants frequently take to social media to vent their frustration and dissatisfaction with the family courts,[52] court officials, the parties and their representatives and in so doing may breach s 121. *Lackey v Mae*,[53] a decision concerning a parenting dispute, is a prime example. In that case, Neville FM was confronted with posts by the father's family and friends on Facebook. His Honour found that the father was the source of the information, as the posts contained information to which only the Court and the parties had access. The judge had previously warned the father that he risked receiving a penalty for breaching s 121. Despite the warnings, comments continued to be posted on Facebook. These postings virulently denigrated and criticised the Court and the court process as well as the independent children's lawyer, the court experts and their reports, the Department of Community Services and the NSW Police. They also commented on, and provided details of, proceedings before the Court. Neville FM took the opportunity to comment on the prevalence of cyber-bullying and the use of social media as a weapon in modern litigation stating:

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[49] *Police v Slater* (unreported, New Zealand District Court, Harvey J, CRN 004028329 – 9833, 14 September 2010) [15]. This comment was made in the context of considering, inter alia, whether Mr Slater had breached a statutory prohibition contained in ss 139 and 140 of the *Criminal Justice Act 1985* (NZ) by publishing a name or particulars which were likely to lead to the identification of a person upon whom an offence under the relevant section of the *Crimes Act 1961* (NZ) was alleged to have been committed: [2].

[50] *Xuarez v Vitela* [2012] FamCA 574, [55]. Blogs were also considered in *Y v H* (2005) 192 FLR 126; [2005] FMCAfam 229. In that case, H's mother published comments on her internet blog site about proceedings that were before the court and also about H's father. The blog site included photos of the mother and of H. The mother was a dedicated blogger and had a fairly wide audience. Indeed, Baumann FM described her as a person who had "chosen to use the internet as a forum for debate and comment about her life and experiences" (at 130) and the blog as having had a number of hits from fellow travellers or internet surfers (at 130). Baumann FM was not asked to decide whether the mother's blog infringed s 121, but rather, to order her not to post information about the proceeding or comments which denigrated H's father. An injunction to that effect was granted. Had Baumann FM been required to apply s 121, it seems tolerably clear that the mother's blog would have been regarded as a publication "by other electronic means", since it was apparently accessible to anyone with an internet connection.

[51] In *Swinton v Barnstable* [2011] FamCA 548, a father established a blog on which he recounted times spent with his child. Members of his family and close friends, including the child's mother, were able to follow his and the child's activities. The mother was concerned that persons unknown to the family might identify and target the child, despite the father's careful vetting of the blog. As part of the parenting orders, Ryan J allowed the father to maintain the blog on condition that he changed its name so that it did not identify the child and set the security parameters so that it was password protected and access limited to trusted friends and family. The Judge stated that "[u]nless these conditions can be met, the father will be required to close the blog and use another form of social media [anonymised and password protected] to maintain this type of intra-family communications": [128]. The case did not involve s 121, as it does not appear from the facts that the blog contained an account of proceedings. Had it done so, one would have expected the judge to have ordered the father to close the blog if the judge regarded identification to family and friends as violating the provision.

[52] Such disparagement and abuse of the family courts might amount to a scandalising contempt.

[53] *Lackey v Mae* [2013] FMCAfam 284.

> it seems often to be the case that people will put on such media (particularly but not only *Facebook*) comments that I suspect they would not say directly to the person against or about whom such remarks are directed. In this regard, such remarks are, in my view, a form of cyber-bullying. Often, they are very cowardly, because those who "post" such derogatory, cruel and nasty comments (regularly peppered with disgusting language and equally vile photographs) appear to feel a degree of immunity; they think they are beyond the purview or accountability of the law, and that they need not take any responsibility for their remarks. They inhabit the cyber-sphere and operate as "Facebook rangers" who "hit and run" with their petty and malicious commentary, and seem to gloat (or be encouraged) by the online audience that waits to join the ghoulish, jeering crowd in the nether-world of cyber-space. To a significant degree, such conduct has been on display here.[54]

Social media has created a number of legal issues in the family law context.[55] The pertinent question for the purposes of this article is the circumstances in which the use of social media might infringe the prohibition in s 121. While posting information about a proceeding under the *Family Law Act* on one's Facebook page or Twitter, or posting photos on Instagram, clearly constitutes communication "by electronic means", whether it amounts to a "publication" is likely to depend on the number of Facebook friends or Twitter or Instagram followers to whom the communication is made and the ability of those friends or followers to tag, share, re-post or re-tweet the information. If the postings appear on a public Facebook page viewable by the world at large, then publication has presumably occurred. This was the view of Judge Harman in *Longford v Byrne*.[56] In that case the father posted on his Facebook page photos of the mother and children and information identifying where they lived. Judge Harman clearly regarded these postings as publishing, describing the father as having "caused to be placed in the public domain on a public Facebook page viewable by anybody who should choose to look upon them".[57] His Honour concluded that the father's actions were prima facie in breach of s 121 and ordered that he remove the posts and be restrained from posting on the internet or publishing any photographs of the mother or the children or any reference to, or comment about, the mother or the children or the proceedings.[58] By contrast, a poster who only has a limited number of friends or followers and whose settings are set to private might not be regarded as having published proscribed details for the purpose of s 121. The same reasoning would apply to emails and texts sent to small groups. The resolution of this issue awaits adjudication by a court.

"Otherwise disseminating to the public or a section of the public"

The last type of communication – "or otherwise disseminates to the public or to a section of the public" – is the least specific. A number of propositions can be extracted from the cases in which it has been considered. First, in *Re W: Publication Application* (*Re W*) the Full Court of the Family Court held that the phrase was not to be read subject to the *ejusdem generis* rule, such that it would only catch the transmission of information through traditional media channels.[59] However, although not confined to dissemination in the mass media, as explained above, courts have held that the phrase should be taken as a reference to "widespread communication with the aim of reaching a wide

[54] *Lackey v Mae* [2013] FMCAfam 284, [9]–[10].

[55] They include: Is social media discoverable? Are Facebook posts, photos and communications admissible as evidence in both parenting and financial disputes? Does deleting comments from social media or deactivating a social media account constitute a destruction of evidence? Does social media feature in contact orders made by the family courts? For a brief discussion of these issues, see: Grant Riethmuller et al, "Family Law in the Age of Technology" (Paper presented at the Family Law Conference, Melbourne, 14 October 2011); Evelyn Young and Louise Fairbairn, "Netiquette in Aladdin's Cave" (2014) 88 LIJ 42.

[56] *Longford v Byrne* [2015] FCCA 2504.

[57] *Longford v Byrne* [2015] FCCA 2504, [32]. No reference was made by Judge Harman to the number of "friends" required to constitute publishing.

[58] See also *Darcy v Cameroon (No 3)* [2010] FamCA 347, where Strickland J was inclined to the view that the mother's posting of identifying material about the case on her Facebook page was an obvious breach of s 121.

[59] *Re W: Publication Application* (1997) 137 FLR 205; [1997] FLC 92-756, 84,258, 84,267. The Court endorsed similar views that had been expressed in *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434, 436. See also *Winters v Winters* [2015] FamCA 195, [13].

audience".[60] In *Re W*, the Full Court offered the following as examples of dissemination that would be caught by s 121: "in a book; in a one-off pamphlet sold in newsagents or distributed to letterboxes; via the Internet;[61] and in a documentary film shown in a cinema".[62] To exclude these from the reach of the expression "or otherwise disseminates" would "constitute a narrow and artificial construction of those words and defeat the object of the provision".[63] This interpretation means that the section has an inhibiting effect on groups that wish to organise public rallies to express legitimate concern about the operation of the family law system. An example of this occurred in 2009, when a group of people wanted to express their distress that the system allows violent ex-partners to have access to children.[64] The organisers of the event wanted people whose children had been killed or injured by their ex-partners during visits to be able to address the crowds. In order not to infringe s 121 they would have had to do so wearing hoods and scarves and perhaps even disguise their voices.[65]

At the other end of the spectrum, in *Re Edelsten; Ex parte Donnelly*, Morling J stated:

> It cannot have been intended by the legislature that the restriction on dissemination should apply, for example, to conversations between a party to Family Court proceedings and a close personal friend.[66]

Then there are disclosures that fall somewhere between widespread communication and private conversations. Numerous cases have considered whether divulging identifying information to a government department or to particular persons in a professional capacity constitutes a dissemination to the public or a section of the public. For example, in *Re W*,[67] the Full Court of the Family Court had to determine whether making available to the Queensland and New South Wales child welfare departments a judgment in which a judge had made adverse findings about a parent's sexual conduct towards his young son would constitute a prohibited dissemination. If so, the judgment could be forwarded to the departments only if one of the exceptions in s 121 applied which, at that point in time, was not the case. The majority – Fogarty and Baker JJ – held that the child representative who wanted to forward a copy of the judgment to these child welfare departments did not need the Court's authorisation to do so, as these State departments did not constitute a "section of the public" within the meaning of s 121(1).[68] The majority held that "those who can demonstrate an interest beyond that of an ordinary member of the public are not prevented by s 121 from access to a judgment (whether edited or not) in which they have such an interest".[69] In this case, the child welfare authorities in question had a significant and legitimate interest in the judgment which was not shared by other sections of the public. Finn J was inclined to agree that the child welfare departments, because of their functions, had a "special interest in the information sought to be provided in this case", "over and

[60] *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434, 436.

[61] At the time *Re W: Publication Application* (1997) 137 FLR 205; [1997] FLC 92-756 was decided, the clause relating to communication by "other electronic means" had not been inserted into s 121.

[62] *Re W: Publication Application* (1997) 137 FLR 205; [1997] FLC 92-756, 84,259.

[63] *Re W: Publication Application* (1997) 137 FLR 205; [1997] FLC 92-756, 84,259.

[64] See ABC Radio National, "Restrictions on Media Coverage of Child Protection and Family Court Matters", *The Law Report*, 21 April 2009 <http://www.abc.net.au/radionational/programs/lawreport/restrictions-on-media-coverage-of-child-protection/3148830>.

[65] Adele Horin, "Anger at Law That Fails Children", *Sydney Morning Herald* (online), 4 May 2009 <http://www.smh.com.au/national/anger-at-law-that-fails-children-20090503-arfs.html>. This article reported that many attendees chose not to anonymise themselves and some pinned their dead children's names on shirts on a makeshift clothesline which was erected at the rally.

[66] *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434, 436. These sentiments were approved by Kenny J in *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308; [2001] FCA 1747.

[67] *Re W: Publication Application* (1997) 137 FLR 205; [1997] FLC 92-756.

[68] In so holding, Fogarty and Baker JJ relied on the majority judgment of the High Court of Australia in *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201, 208; 59 ALJR 785.

[69] *Re W: Publication Application* (1997) 137 FLR 205; [1997] FLC 92-756, 84,258. Finn J (in dissent) described their Honours as having based this conclusion on "certain sections of the *Family Law Act* and certain protocols between 'the Court' and child welfare authorities; on the similar objectives of the jurisdiction of the Court and the child welfare departments, and on the interest which those departments would have in the information sought to be provided to them because of their functions, which is an interest distinct from the interest of the ordinary public": 84,267.

above that of ordinary members of the public", with the result that "the provision of the information to them could be said not to be a dissemination to the public or to a section of it for the purposes of s 121(1)".[70] However, Her Honour ultimately held that this conclusion was not open, since it could not be reconciled with ss 121(9)(b) and (c), which provided that the prohibition in s 121 does not apply to the communication of any pleading, transcript of evidence or other document to a body responsible for disciplining members of the legal profession or for granting legal aid. The problem for Finn J was that these bodies could also be said to have a special interest in the provision of information about proceedings under the *Family Law Act*, yet the fact that the legislature saw the need to exempt them from s 121 suggested to Finn J that, absent the exemption, they would have been subject to the prohibition. Since child welfare departments were not, at that point in time, covered by an exception, it must follow that providing them with identifying information would violate the prohibition.[71] It is suggested that Finn J was not compelled to reach this conclusion. A communication of identifying information to a government department, agency or person should be judged according to whether it constitutes a dissemination to the public or a section thereof. If it does not, the section is not breached and any exemption of that particular communication, such as those contained in ss 121(9)(b) and (c), is best regarded as having been inserted out of an abundance of caution in order to put the matter beyond doubt.

Other cases have held that it was not a breach of s 121 for a husband to take documents relating to a custody case to the Yugoslav consulate for advice,[72] or for a judge of the Family Court of Western Australia to inform the Attorney-General, via the transmission of documents, that a certain couple had engaged in tax evasion, since the Attorney-General was selected as the recipient because of his specific position and accordingly was not "the public" for the purposes of s 121.[73] More recently, it was held that the dissemination of material to a therapeutic psychologist was a purely personal communication.[74]

There is also an issue as to how s 121 should operate where a witness in a case being conducted in open court is asked to recount information about a previous family law proceeding. While this scenario comes within the exception in s 121(9)(a), courts have indicated that compulsory examination of a witness does not constitute a dissemination and even if it was regarded as such, it would be regarded as a dissemination to the court, not to the public.[75] If so, the exemption in s 121(9)(a) is not strictly necessary.

What is an account of proceedings?

Section 121 does not prohibit outright the identification of parties, witnesses or other persons who are associated with proceedings under the *Family Law Act*. What it *does* prohibit is the identification of such persons in the context of publishing or disseminating "any account of any proceedings, or of any part of any proceedings". This raises the question: what is an account of proceedings? Earlier on in the life of the section (in its current iteration), Dickey opined that it would be unreasonable to interpret s 121 as prohibiting the publication of a mere statement to the effect that a particular person is a party to proceedings under the Act. He argued that there is a difference between publishing the mere existence of proceedings and publishing an account of proceedings; the latter requires details and a

[70] *Re W: Publication Application* (1997) 137 FLR 205; [1997] FLC 92-756, 84,268.

[71] Section 121(9)(aa), which was inserted into the *Family Law Act* in 2015, now excludes from the operation of s 121: "the communication of any pleading, transcript of evidence or other document to authorities of States and Territories that have responsibilities relating to the welfare of children and are prescribed by the regulations for the purposes of this paragraph". It is discussed below.

[72] *In Marriage of Toric* (1981) 7 Fam LR 370; [1981] FLC 91-046.

[73] *In Marriage of T* [1984] FLC 91-588.

[74] *Winters v Winters* [2015] FamCA 195, [15].

[75] *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434, 436 (wife was summoned to give evidence in her husband's bankruptcy proceedings and was questioned about pending family law proceedings between herself and her husband). See also *R Pty Ltd v Jones* [2016] FamCA 928.

degree of narration.[76] Dickey's view has since been affirmed by the cases. In *Hinchcliffe v Commissioner of Australian Federal Police* the Federal Court held that, for the purposes of s 121, an account

> is a narrative, description, retelling, or recital of such proceedings. … There is no account of proceedings merely because some allegations made in the proceedings are reiterated outside the Court. Before there can be an account of proceedings in the relevant sense, a communication must purport to narrate, describe, retell or recite something that has happened in the proceedings, or something about the proceedings.[77]

In the New Zealand case of *Police v Slater*, which concerned ss 139 and 140 of the *Criminal Justice Act 1985* (NZ), Harvey J explained that although an account must relate to proceedings, it is not limited to a record of "what happened in court today". That is, it need not be an account given by an eyewitness who was present in court, but rather, encompasses any narrative or information relating to proceedings, including commentary or opinion about a case.[78] It is suggested that s 121 is similarly not restricted to eye witness accounts.

Mallam et al suggest that an account of proceedings would obviously include "an account of any of the evidence in the proceedings" and a "general description of the course of the proceedings".[79] A transcript of proceedings would also seem to qualify,[80] as would a recitation of the orders of the court even where there is no narration of their factual foundation or of the evidence.[81] Conversely, Mallam et al suggest that the section does not prohibit "a mere reference to the existence of the proceedings".[82] The authors opine that s 121 should not prohibit a statement of "the bare detail of the result of proceedings", such as "Mrs X obtained custody of the children" or "Mr X got the family home".[83] Indeed, it is difficult to avoid such statements; they are matters of fact and it is often necessary to divulge such information or impossible to conceal it. Nevertheless, Mallam et al concede that the position in respect of such statements is unclear. They conclude that "the more detail that is included, the greater the likelihood of a contravention".[84]

Some assistance as to what s 121 does and does not prohibit may be gleaned by analogy from the Victorian case of *Howe v Harvey*.[85] In that case, the Supreme Court of Victoria was required to interpret s 26 of the *Children and Young Persons Act 1989* (Vic), which prohibited a person from publishing or causing to be published a "report of a proceeding" in the Children's Court of Victoria that contained "particulars likely to lead to the identification" of a child or other party to the

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[76] Anthony Dickey, "The Scope of Section 121 of the Family Law Act" (1992) 66 ALJ 289, 289.

[77] *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308; [2001] FCA 1747, [53]. This interpretation was adopted in *D v H* [2008] QSC 35, [16]. In the *Hinchcliffe* case, Kenny J held that a husband and wife had not breached s 121 by making false statements about each other to their friends which repeated allegations contained in documents filed in their divorce proceedings, because these statements did not "narrate, describe, retell or recite something that has happened in the proceedings, or something about the proceedings": [53].

[78] *Police v Slater* (unreported, New Zealand District Court, Harvey J, CRN 004028329 – 9833, 14 September 2010) [17].

[79] P Mallam, J Moriarty and S Dawson, *Media and Internet Law and Practice* (Thomson Reuters, subscription service) [15.430].

[80] *Seaward v MacDuff (No 4)* [2012] FamCA 1147, [22]. In *Winters v Winters* [2015] FamCA 195, [18] it was said of *Seaward*: "In so far as Ryan J held that s 121(9)(b) was engaged, Her Honour must have regarded the transcript as an account of proceedings".

[81] *Debrossard v AB Commission* (2016) 22 DCLR(NSW) 260; [2016] NSWDC 109, [18].

[82] Mallam, Moriarty and Dawson, n 79, [15.430].

[83] Mallam, Moriarty and Dawson, n 79, [15.430].

[84] Mallam, Moriarty and Dawson, n 79.

[85] *Harvey v Channel 7 Melbourne Pty Ltd* (unreported, Magistrates' Court, 15 May 2006); *Howe v Harvey* (2007) 173 A Crim R 14; [2007] VSC 130 (Williams J); *Howe v Harvey* (2008) 20 VR 638; [2008] VSCA 181. It goes without saying that a court interpreting s 121 is not bound to follow this decision, since it pertains to different legislation.

proceeding or a witness in the proceeding.[86] A 14-year-old boy made an application to the Children's Court for a finding that there were irreconcilable differences between himself and his mother, such that his care and control were likely to be seriously disrupted. The Children's Court made this finding and, as a consequence, made an order giving guardianship and custody of the boy to the Department of Human Services. The case received extensive coverage in two articles in the *Sunday Herald Sun* and on three broadcasts on Channel Seven. In most of this coverage the boy was described as having "divorced" his mother and in a number of cases the boy, his mother and his step-father were named, the boy was photographed and his school and the location in which he lived were mentioned.

In May 2006, the Herald and Weekly Times Pty Ltd and television station Channel 7 were each convicted in the Victorian Magistrates' Court of breaching s 26(1) of the *Children and Young Persons Act 1989*. The charges against the editor of the Herald and Weekly Times (Mr Howe), Channel 7's news program director (Mr Carey) and executive producer of *Today Tonight* (Mr McPherson) were adjourned without conviction on their undertaking to be of good behaviour.[87] Each of these defendants unsuccessfully appealed to the Supreme Court and then to the Court of Appeal, which also dismissed their appeals.

In all three proceedings, the defendants advanced a number of reasons as to why they should not be regarded as having published a report of proceedings in the Children's Court of Victoria in contravention of s 26. One was that their publications did not mention the Children's Court by name. Another was that most of the publications used the word "divorce" to describe what had occurred between the boy and his mother, and since the Children's Court has no power to grant divorces between parents and their children, the publications could not be described as a report of what the Court had actually done.

At first instance, the Magistrate, referring to *Hinchcliffe v Commissioner of Australian Federal Police*,[88] held that a "report" is a wider concept than an "account" and does not require the same element of narration.[89] If this is correct, then s 26 (and its current equivalent) will be more easily breached than s 121 of the *Family Law Act*. The Magistrate also held, and the appellate courts agreed, that the reports did not need to specifically refer to the matter as having taken place in the Children's Court in order to breach s 26, as the statutory purpose of the provision – protecting children from disclosure of their identities – would be compromised if the protection were to be confined in the manner argued. It would be too easy to circumvent the restriction; the media would simply report the prohibited details without identifying the court. It is suggested that the same reasoning would apply to s 121 and the family courts.

Each Court also agreed that the disclosure in relation to a proceeding need not be direct before it can be described as a report; it can be implied. Thus, to describe a boy as having divorced his mother, when coupled with the use of words and phrases such as "legally" and "authorities have granted", is to impliedly convey that a court proceeding had occurred and that is sufficient; "[t]here was after all no story without the orders made by the Children's Court".[90] The Magistrate added that the colloquial wording (that is, the reference to "divorce") could not be used as a shield to avoid responsibility, as

[86] The *Children and Young Persons Act 1989* (Vic) was subsequently repealed and replaced by the *Children, Youth and Families Act 2005* (Vic). Section 534 of the 2005 Act is in almost identical terms to s 26 of the 1989 Act.

[87] Similar charges laid against the newspaper's reporter and the television station's producer and program presenter were dismissed on the basis that these persons could not fairly be held responsible for the publications. The DPP appealed against this finding. This aspect of the case is not discussed in this article.

[88] *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308; [2001] FCA 1747.

[89] This aspect of the Magistrate's decision is cited by Williams J in *Howe v Harvey* (2007) 173 A Crim R 14; [2007] VSC 130, [24].

[90] This aspect of the Magistrate's decision is cited by Williams J in *Howe v Harvey* (2007) 173 A Crim R 14; [2007] VSC 130, [26].

the substance of the report is still the same, namely, that "a 14 year old boy is no longer in the legal custody of this mother because the Court has ordered this be so".[91] Presumably, the same argument could be made in respect of s 121.

It was, however, essential that the identification of a child, other party or witness conveys a requisite connection with a proceeding. That is, the words "a report of a proceeding" in s 26 "require a link between the proceedings which have in fact occurred in the court and the identifying particulars".[92] Were it otherwise, it would infringe the provision to publish anything about a child who happened to have been before the Children's Court, no matter how far removed the subject matter of the publication from the proceeding. In *Howe v Harvey*, the newspaper articles and television program segments were held to be "reports of a proceeding" for the purposes of s 26(1)(a) as they purported to recite something that had happened in the proceedings, or something about the proceedings, by describing the outcome of proceedings which had actually occurred in the Children's Court and explaining that the "divorce" was granted on the grounds of irreconcilable differences.[93] The same connection would no doubt be imported by the phrase "any account of proceedings" in s 121.

A case study of what constitutes an account of proceedings: The Italian Sisters Case

The fine line that can exist between what constitutes an account of proceedings and what does not is highlighted in what has become known as the "Italian Sisters Case". The mother, an Australian, met and married the father in Italy. The couple resided in Italy and had four daughters there. The marriage ended in 2007 and under Italian law both parents were awarded joint custody of the girls. In 2010, the girls were taken to Australia by their mother, ostensibly for a four-week visit with her family in Queensland. In actual fact, the mother had told the Australian embassy in Italy that she was fleeing an abusive husband and father, and reportedly received assistance from the embassy and the Department of Foreign Affairs to fly to Australia with her daughters. Following their "abduction", the father began his fight to have his four daughters returned to Italy, as he had never consented to their relocation. In 2011 the Family Court of Australia ordered that the girls be returned to Italy for the custody hearing.[94] The mother and members of her family defied the Family Court's order that the four girls be returned to their Italian father for custody hearings by taking the children into hiding.

Queensland Newspapers Pty Ltd, publisher of the *Courier Mail*, reported the story on a number of occasions in May 2012.[95] The articles clearly sided with the mother and much of the reporting was

[91] This aspect of the Magistrate's decision is cited by Williams J in *Howe v Harvey* (2007) 173 A Crim R 14; [2007] VSC 130, [26].

[92] *Howe v Harvey* (2008) 20 VR 638, 658; [2008] VSCA 181.

[93] *Howe v Harvey* (2008) 20 VR 638, 660; [2008] VSCA 181.

[94] *Department of Communities (Child Safety Services) v Garning* [2011] FamCA 485. In so ordering, the Court was discharging its obligations under the *Convention on the Civil Aspects of International Child Abduction (Hague Convention)*, opened for signature 25 October 1980, 1343 UNTS 97 (entered into force 1 December 1980). The Hague Convention is concerned with the wrongful removal or retention of a child from their country of habitual residence. The applicant must prove that the removal or retention of the child constituted a breach of custody rights attributed by the law of that State and that the applicant was actually exercising those rights at the time of the wrongful removal or retention: *Family Law Act 1975* (Cth) s 111B(4). The judicial function is thus to determine the threshold issue of whether or not the Hague Convention applies and, if so, whether the limited exceptions that give rise to a discretion not to order the return of a child are made out. Such exceptions include where there is a grave risk that returning children would expose them to harm or to an intolerable situation, but this discretion was not exercised by the Court in this case. A return order must be made forthwith and as such, an application does not deal directly with the merits of where a child should live or with whom a child should spend time, but leaves the determination of custody and access to the court of the child's habitual residence. An appeal to Full Court of the Family Court failed: *Garning v Director-General, Department of Communities* [2012] FamCAFC 35 (Bryant CJ, Faulks DCJ and Coleman J). An appeal to the High Court, in which it was argued that the girls should have had separate legal representation and were therefore denied procedural fairness, was dismissed: *RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Forrest* (2012) 247 CLR 304; 87 ALJR 1; [2012] HCA 47. The facts of the case and the course of the litigation are outlined in Adiva Sifris, "The Hague Child Abduction Convention 'Garnering' the Evidence: The Australian Experience" (2013) 19 *Southwestern Journal of International Law* 299.

[95] See, eg, Tuck Thompson, "Court Rips Daughters Away from Mother", *Courier Mail* (Brisbane), 12 May 2012; Tuck Thompson, "Sisters on the Run", *Courier Mail* (Brisbane), 15 May 2012; Tuck Thompson, "Dad, Please Let Us Stay", *Courier Mail* (Brisbane), 16 May 2012.

inaccurate. One sentence read:

> A Sunshine Coast family is being ripped apart by a Family Court ruling that is forcing four young girls on to a flight to Italy to live with a father they describe as a physically abusive workaholic.[96]

On 15 and 16 May 2012, photographs of the girls were published on the front page, along with their names and excerpts of private letters they had written to their father. This was despite the fact that journalists were warned several times by court staff and a legal officer "about the ramifications of identifying the family".[97] The Chief Justice of the Family Court lodged a complaint about the articles with the federal Attorney-General. The matter was referred to the Australian Federal Police and a prosecution against Queensland Newspapers Pty Ltd was duly commenced. In the meantime, in October 2012, the four girls were forcibly removed from their mother by the federal police and returned to Italy to reside with their father.

In August 2013, Queensland Newspapers Pty Ltd pleaded guilty in the Queensland Magistrates Court to four counts of breaching s 121.[98] The publisher was subsequently sentenced by the Queensland District Court and fined $120,000.[99] In his sentencing remarks, Martin J said:

> It seems to me that the newspaper seized upon what it regarded as a sensational story, which would be attractive to readers, and put the story ahead of its legal obligations …
>
> I accepted the submission it was undertaken for commercial gain …
>
> In this case the offending publication made the parties and their children notorious throughout Australia. … [the father] of course, was vilified in the publications …[100]

In an opinion piece in *The Australian* newspaper, retired Family Court judge Brian Jordan described the *Courier Mail's* publications as unprecedented and stated:

> In my 20 years as a judge on the Family Court of Australia, and 40 years in the law, I have never before witnessed such irresponsible and harmful reporting of children's matters before a court.[101]

It was also reported that s 121 was infringed through social media:

> A Facebook page was created, allegedly by the four children, containing photographs and identifying details of the children and other family members, references to the Court proceedings and copies of correspondence from the father's lawyers.[102]

The *Courier Mail* acted in flagrant disregard of s 121 but was not the only media outlet to cover the story. Channel Nine's *60 Minutes* program filmed the girls as they left Australia in October 2012 and followed them back to their father's residence in Italy where they filmed them as they begged reporters to help them escape. Some years later, in April 2015, the *60 Minutes* program did a follow-up story on the girls, which included an interview with the two older sisters. The focus of the questioning was on what it was like for them to be forcibly removed from their mother and put on a plane to Italy against their will. They were also questioned about their life in Italy since their return. The girls appeared to be settled and happy and admitted to having made exaggerated claims about their father. Channel Nine was not prosecuted for either of these broadcasts, presumably because,

[96] Thompson, "Court Rips Daughters Away from Mother", n 95. The article is reproduced in <http://www.abc.net.au/mediawatch/transcripts/1237_cm1.pdf>.

[97] "Courier-Mail Fined for Identifying Family in Custody Battle", *Brisbane Times* (online), 24 March 2014 <http://www.brisbanetimes.com.au/queensland/couriermail-fined-for-identifying-family-in-custody-battle-20140324-35cwg.html>. See also <http://www.abc.net.au/mediawatch/transcripts/brisbanetimes_240314.pdf>.

[98] Marissa Calligeros, "The Courier-Mail Pleads Guilty to Family Law Breach in the Italian Sisters Custody Case", *Brisbane Times* (online), 23 August 2013 <http://www.brisbanetimes.com.au/queensland/the-couriermail-pleads-guilty-to-family-law-breach-in-the-italian-sisters-custody-case-20130822-2sfii>.

[99] "Courier-Mail Fined for Identifying Family in Custody Battle", n 97.

[100] The authors do not have a copy of the judgment. This quotation from the judgment is taken from "Courier-Mail Fined for Identifying Family in Custody Battle", n 97.

[101] Brian Jordan, "Front Page No Place for Kids Caught in Family Disputes", *The Australian*, 21 May 2012, 26. The article is reproduced in <http://www.abc.net.au/mediawatch/transcripts/1237_oz1.pdf>.

[102] Young and Fairbairn, n 55, 44.

unlike the *Courier Mail* articles, they made no reference to the Family Court proceedings or the court process, and therefore did not constitute the publication of "an account of proceedings".[103] However, the audience would have been well acquainted with the background of these broadcasts,[104] thus demonstrating the relative ease with which the policy underlying s 121 can be undermined in circumstances where other media outlets have provided the audience with the necessary background. Clearly, the *60 Minutes* programs would not have had the same the attraction without the earlier reporting of the Family Court proceedings; nevertheless, through clever reporting Channel 9 avoided breaching s 121.

How long does the prohibition persist?

Whether a prohibition such as the one in s 121 applies only while proceedings are current or whether it is enduring is ultimately a question of statutory interpretation. In *Clayton v Clayton*,[105] the United Kingdom Court of Appeal held that a prohibition on identification in s 97(2) of the *Children Act 1989* (UK) lasted only so long as the proceedings were on foot. The critical factor in that case was the phrase "the child *as being involved* in any proceeding". The Court held that the present tense used in this phrase imposed a temporal link which restricted the operation of the provision to current proceedings.

By contrast, in *Howe v Harvey*,[106] discussed above, the prohibition on identification in ss 26(1)(a) and (b) of the *Children and Young Persons Act 1989*, which was worded differently to s 97(2) of the *Children Act 1989*, was held to persist beyond the conclusion of the proceedings. From a policy perspective, the Victorian Court of Appeal held that:

> the statutory purpose of protecting the privacy of children and preventing their stigmatisation because they have been a party in Children's Court proceedings would be undermined by a construction which permitted children to be photographed as they left the court on the conclusion of proceedings or immediately afterwards.[107]

In similar vein, there is nothing in the wording or tense of s 121 that suggests that its operation is confined to the duration of the proceedings. While this clearly upholds the statutory purpose of the provision, it does prevent litigants from publicly recounting their past experiences in the Family Court unless they either do not identify themselves or anyone else involved in the proceeding or they obtain the permission of the court to do so pursuant to s 121(9)(g).

Exceptions to the prohibition

Section 121(9) contains a lengthy list of exceptions to the prohibitions. Each will be considered.

Communications in connection with court proceedings

> (a) the communication, to persons concerned in proceedings in any court, of any pleading, transcript of evidence or other document for use in connection with those proceedings;[108]

As discussed above, a person who is compelled to give evidence to an open court which involves recounting evidence or producing a document that was given or produced in an earlier or concurrent family law proceeding might not be regarded as having infringed s 121 on the basis that the disclosure is involuntary and, in any event, is made to the court not to the public.[109] But even if such communication was regarded as infringing s 121, it is the subject of an exception.

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[103] Young and Fairbairn, n 55. See also ABC Radio National, "Justice Tweeted is Justice Done", *The Law Report*, 9 July 2013 <http://www.abc.net.au/radionational/programs/lawreport/social-media-courts/4805884>.

[104] ABC Radio National, n 103.

[105] *Clayton v Clayton* [2006] EWCA Civ 878.

[106] *Harvey v Channel 7 Melbourne Pty Ltd* (unreported, Magistrates' Court, 15 May 2006); *Howe v Harvey* (2007) 173 A Crim R 14; [2007] VSC 130 (Williams J); *Howe v Harvey* (2008) 20 VR 638; [2008] VSCA 181.

[107] *Howe v Harvey* (2008) 20 VR 638, 665; [2008] VSCA 181.

[108] See *R v Howe* (1978) 19 SASR 303; 34 FLR 440; 4 Fam LR 166, 169; *In Marriage of Bateman and Patterson* (1981) 51 FLR 263.

[109] *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434; *R Pty Ltd v Jones* [2016] FamCA 928.

This exception has been considered in a number of cases and has also been the subject of comment by the Australian Law Reform Commission.[110] In *R v Howe*, the Supreme Court of South Australia held that the words "any court" are "entirely general" and "wide enough to include any criminal court and any civil court in Australia", whether or not they normally exercise any jurisdiction under the *Family Law Act*.[111] Moreover, the phrase "persons concerned in proceedings" includes, but is not limited to, the judge, counsel, reporters and any members of the public present in court.[112] Accordingly, it was held to be permissible, in a proceeding in the District Court of South Australia concerning charges of assault, for the trial judge to allow the appellants to be cross examined about statements they had made in a joint affidavit filed in the Family Court and to admit the affidavit into evidence. This decision was recently confirmed by Carew J in *R Pty Ltd v Jones*.[113] In *Waldman v Waldman*[114] a father was permitted to provide an affidavit that had been filed in a family law proceeding to a psychiatrist retained by him to provide an assessment of him for use in forthcoming criminal proceedings.[115] The Court was satisfied that the psychiatrist was "a person concerned in proceedings in any court" even if he or she was not ultimately called to give evidence.[116]

Communications relating to child welfare, discipline of legal profession or legal aid

(aa) the communication of any pleading, transcript of evidence or other document to authorities of States and Territories that have responsibilities relating to the welfare of children and are prescribed by the regulations for the purposes of this paragraph;[117] or

(b) the communication of any pleading, transcript of evidence or other document to:

(i) a body that is responsible for disciplining members of the legal profession in a State or Territory; or

(ii) persons concerned in disciplinary proceedings against a member of the legal profession of a State or Territory, being proceedings before a body that is responsible for disciplining members of the legal profession in that State or Territory; or

(c) the communication, to a body that grants assistance by way of legal aid, of any pleading, transcript of evidence or other document for the purpose of facilitating the making of a decision as to whether assistance by way of legal aid should be granted, continued or provided in a particular case.

[110] The ALRC took the view that this exception sufficiently enabled the sharing of information about family law proceedings to those involved in protection order proceedings under State and Territory family violence legislation: Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) [30.99]–[30.110].

[111] *R v Howe* (1978) 19 SASR 303, 306; 34 FLR 440; 4 Fam LR 166. The Court was actually concerned with s 121(5)(a), the predecessor to s 121(9)(a), which was in very similar terms. Section 121(5)(a) provided that s 121 did not apply to or in relation to "the printing of any pleading, transcript of evidence or other document for use in connexion with proceedings in any court or the communication of any such document to persons concerned in the proceedings."

[112] *R v Howe* (1978) 19 SASR 303, 309–310; 34 FLR 440; 4 Fam LR 166.

[113] *R Pty Ltd v Jones* [2016] FamCA 928. Proceedings had been issued in the Family Court but resolved by consent. Carew J granted an application for leave to use in the Supreme Court documents which had been produced in the earlier property proceedings. Carew J accepted the proposition that this did not constitute "publication" or "dissemination" within the meaning of s 121(1) and in any event was within the exception contained in s 121(9)(a).

[114] *Waldman v Waldman* [2013] FCCA 1035.

[115] The affidavit annexed a report from C, a family therapist and family consultant who had been retained by the parties "for the purposes of assisting them and the Court in relation to their parenting dispute": *Waldman v Waldman* [2013] FCCA 1035, [1]. C was a witness in the family law proceedings. The report identified C, the parties and the children.

[116] The judge considered that the situation would have been different had the father been seeking permission to provide the affidavit to a psychiatrist who was not retained by him for a court proceeding but to obtain mental health care. In that case, s 121(9)(a) would not apply and the father would need to seek an order under s 121(9)(d). Although the Court affirmed that the exception in s 121(9)(a) was attracted on the facts, it did not make a declaration to that effect as the father was merely seeking "a restatement of the law to cover an intended action": *Waldman v Waldman* [2013] FCCA 1035, [24].

[117] The prescribed authorities are: for New South Wales – the Department of Family and Community Services; for Victoria – the Department of Health and Human Services; for Queensland – the Department of Communities, Child Safety and Disability Services; for Western Australia – the Department for Child Protection and Family Support; for South Australia – the Department for Education and Child Development; for Tasmania – the Department of Health and Human Services; for the Australian Capital Territory – the Department of Community Services; and for the Northern Territory – the Department of Children and Families: *Family Law Regulations 1984* (Cth) r 19A.

The inclusion of these exceptions arguably suggests that Parliament would otherwise regard a communication to any of these bodies or persons as a violation of s 121. However, as discussed above, the decision of the majority in *Re W* indicates that this is not necessarily the case. If the majority are correct, their exclusion from the prohibition is superfluous if the disclosure does not amount to a publication or dissemination, but it at least puts the issue beyond doubt.[118]

Publication at the direction of a court

(d) the publishing of a notice or report in pursuance of the direction of a court;

Section 121(9)(d) empowers a court to approve the publication of a notice or report containing an account of a proceeding which includes identifying particulars. This exception is of considerable practical importance, yet the courts are given no legislative guidance as to the circumstances in which such directions should be made. In *B v B*[119] it was asserted by counsel that s 121(9)(d) is restricted to orders made to assist in the implementation of the *Family Law Act* and orders which serve the interests of the Court, "such as promoting publicity to assist in locating a kidnapped child when a warrant is issued";[120] the provision does not empower the Court to permit publicity "which is sought as a result of public interest in the proceedings or to lend support to the complaints of a dissatisfied litigant".[121] However, the Court held that the provision should not be given such a restrictive interpretation[122] and that aggrieved parties can apply for an exemption in order to seek publicity and support.[123] Such orders can also be made under s 121(9)(g), which permits the family courts to approve the publication of accounts of proceedings. Indeed, orders are often made under both paragraphs (d) and (g).

Case law indicates that two relevant criteria are generally employed to guide the court's discretion: the best interests of children and the right of freedom of public discussion of matters of legitimate public concern.[124]

Regarding the first criterion, publication orders are commonly made to assist in the location and recovery of missing children in the hope that permitting the dissemination of information about them will assist the Australian Federal Police and State/Territory Police to find them.[125] A publication order made in these circumstances will strictly specify the information that can be published. In the context of missing children, the order will usually permit the publication of the date of birth of the missing child/children; the parent who has abducted them; a detailed description of the missing child/children and the parent; photographs; details of when and where they were last seen; and where they are believed to be currently residing. The publication order may also stipulate how and when the disclosure to the public is to occur. Once a judge of the Family Court has made a publication order, specific details of the case are provided to media outlets and published on the Family Court of Australia website.[126] Journalists may then report those details and, where an interview with a party or person connected with the proceedings is permitted by the order, may contact the Media Manager of the Court to request assistance to contact that person. The media are encouraged not to change the

[118] See also *R Pty Ltd v Jones* [2016] FamCA 928, [38].

[119] *B v B* [1986] FLC 91-741.

[120] *B v B* [1986] FLC 91-741, 75,416. Use of s 121(9)(d) for such purposes is discussed below.

[121] *B v B* [1986] FLC 91-741, 75,416.

[122] *B v B* [1986] FLC 91-741, 75,417.

[123] In the circumstances of that particular case, the parties were not successful in doing so.

[124] *In Marriage of Lowe* (1995) 121 FLR 421; [1995] FLC 92-592.

[125] Family Court Fact Sheet. A publication order is typically sought by a parent whose child has been taken by the other parent.

[126] "The media manager oversees the coordination of media coverage for publication orders that have been made by the courts. This involves developing media releases and public information, liaising with legal representatives and their clients, the Australian Federal Police media unit and media outlets": Family Court of Australia and Federal Magistrates Court of Australia, *2012 – The Year in Review: Chief Executive Officers Report* (October 2012) 70 <http://www.familycourt.gov.au/wps/wcm/connect/69c2124f-c29e-4a84-85cf-dd5983a3b8c3/CEO_Report_2012.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-69c2124f-c29e-4a84-85cf-dd5983a3b8c3-lhWz9oB>.

wording of a publication order or associated official court media release so as not to infringe s 121.[127] The publication order may permit the media outlets which published the original story to publish a report that the child has been located. The order may also stipulate that no information about the case can be reported after a certain period of time has elapsed from the date of the order.

Missing children are not the only circumstances in which publication orders under s 121(9)(d) can be made.[128] As stated above, a court may make a publication order if it considers that the public have an interest in knowing the entire story and being fully appraised of the workings of the Family Court, including the identities of those involved in a particular family law proceeding.[129]

The Family Court of Western Australia has shown a particular willingness to allow the media to publish identifying particulars in cases that have aroused public interest.[130] For example, in *Western Australian Newspapers Ltd v Cuzens*,[131] Harley Cuzens and Heather Glendinning had been involved in protracted family law proceedings over 10 years in relation to their three daughters. In December 2011, the mother murdered her two youngest daughters then took her own life. A coronial inquest was held into the deaths, during which a letter written by the surviving daughter was read out. The letter recounted the ordeal of the family law proceedings and was critical of several aspects, including the fact that it was left to the parents to explain to their children the outcome of the proceedings. Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd applied to the Family Court of Western Australia for permission to publish information concerning the coronial proceedings, including the letter. With the consent of the father and eldest daughter, the Court granted leave to these media organisations to publish a fair and accurate report of the inquest being conducted in the Coroner's Court of Western Australia, on the basis that there was a clear public interest in the full story being known and that it was important to bolster public faith in the judicial system.[132] The Court also permitted these media organisations to publish the Court's judgment in the matter in order to dispel the myths and misunderstandings about what happens in the Family Court and to preserve the reputation of the Court. The only condition was that any such reports direct viewers and readers to the Family Court website for the full judgment.

Another notorious decision which attracted huge media attention – *Farnell v Chanbua*[133] – provides a recent and well-known example of an exercise of a family court's power under s 121(9)(d) and (g) in the public interest.[134] The background to the case concerned a commercial surrogacy arrangement between Australian couple David and Wendy Farnell and Thai woman Pattaramon Chanbua, pursuant to which two embryos were implanted in Pattaramon Chanbua. During the course of the pregnancy one of the babies, a boy known as baby Gammy, was discovered to have Downs Syndrome. After his birth, baby Gammy remained in Thailand with his surrogate mother, allegedly

[127] See Family Court of Australia, "Missing Children Involved in Family Law Cases" (3 May 2016) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/missing-children>.

[128] *In Marriage of Lowe* (1995) 121 FLR 421; [1995] FLC 92-592, 81-853.

[129] Whether s 121 should continue in its existing form or whether it should be amended to accord more fully with the principle of open justice is beyond the scope of this article. However, one of the central arguments promoting open justice is that the public has a right to know what goes on in the family courts on a day-to-day basis.

[130] In addition to the *Farnell* and *Cuzens* cases discussed in this article, the Family Court of Western Australia also permitted the media to publish the name and photographs of six-year-old cancer sufferer Oshin Kiszko and his parents (with certain restrictions). Oshin's treatment for medulloblastoma came before the Court on a number of occasions, as the parents sought to resist medical advice and prevent Oshin from receiving chemotherapy and radiotherapy. The judgments concerning Oshin are also published using his actual name: *Director Clinical Services, Child & Adolescent Health Services v Kiszko* [2016] FCWA 19; *Director Clinical Services, Child & Adolescent Health Services v Kiszko* [2016] FCWA 34; *Director Clinical Services, Child & Adolescent Health Services v Kiszko* (2016) 312 FLR 319; [2016] FCWA 75.

[131] *Western Australian Newspapers Ltd v Cuzens* [2016] FCWA 6.

[132] *Western Australian Newspapers Ltd v Cuzens* [2016] FCWA 6, [36].

[133] *Farnell v Chanbua* [2016] FCWA 17.

[134] The case was decided by the Family Court of Western Australia exercising its powers under ss 243(8)(d) and (g) of the *Family Court Act 1997* (WA), which is the equivalent of *Family Law Act 1975* (Cth) ss 121(9)(d) and (g).

because the Farnells did not want a Downs Syndrome child,[135] while the girl, Pipah, was brought to Australia to reside with the Farnells. An international furore erupted over the circumstances surrounding Pipah's conception, the alleged reasons for her separation from her brother and the fact that David Farnell was a convicted sex offender. The Family Court of Western Australia was called upon to decide whether it was in Pipah's best interests to continue residing with the Farnells or whether she should return to live with the surrogate and her twin brother Gammy in Thailand.

The Court ultimately decided that Pipah should remain with the Farnells, subject to certain conditions. In reaching this conclusion the Court found that, contrary to what had been published in the media, the Farnells had never requested that Gammy be aborted, nor had they abandoned him in the manner portrayed in the media. Towards the end of the case, an issue was raised as to whether the Court should permit the media to publish a fair and accurate report of its judgment. Chief Justice Thackray granted permission, citing, inter alia, the following factors:

- there had been significant public interest in the case and it had been at the forefront of discussion about possible law reform;
- the public has a legitimate interest in knowing how Australian law deals with the complex issues that arose in the proceedings;
- permission had already been given for publication of an account of an earlier stage of these proceedings;
- the increasing prevalence of surrogacy arrangements, and the exploitation of women and children that can result when such arrangements are not carried out in accordance with legislative requirements, is a matter of public interest[136] and publicity might discourage people from entering into such arrangements contrary to law;
- the publication of an account of proceedings would not be inconsistent with Pipah's best interests;
- it would be impossible to publish an account of the proceedings in a way that did not immediately link the story to the notorious "baby Gammy" case; and
- if the Farnells are to receive the "vindication" they want, it would be of limited value unless published in the same way the earlier inaccurate story was published.[137]

The decision of *Australian Securities and Investments Commission v Rich*[138] provides another example of the Family Court exercising its discretion under s 121(9)(d), on this occasion in respect of financial matters. In view of the impending One.Tel collapse and his own personal bankruptcy, One.Tel's managing director, Jodee Rich, used a newly inserted provision in the *Family Law Act* to enter a financial agreement with his wife which involved the transfer of $5 million of assets to her. The Family Court was called on to decide whether it had the jurisdiction to set aside this Financial Agreement. O'Ryan J expressed the view that Rich was using the *Family Law Act* provision to avoid the legitimate claims of creditors, but concluded that the Court lacked jurisdiction to set the agreement aside because there was no matrimonial dispute before it. Subsequently, the Court made an order at the request of ASIC permitting the case to be published with identifying details. The reasons were two-fold: the enormous public interest in the case (including the fact that thousands of shareholders would lose their money in the One.Tel collapse and that a provision of the *Family Law Act* was being deliberately used for unintended purposes) and the fact that the case was primarily financial and did not involve a marriage breakdown or any issues involving children.[139]

[135] The Court found that this was not factually correct.

[136] The Court endorsed comments to this effect made in *Sedgwick v Rickards* [2013] FCWA 52.

[137] *Farnell v Chanbua* [2016] FCWA 17, [735]–[736]. To ensure that Pipah and the family were protected from a media frenzy, the Court imposed a number of conditions on the publication order. Any media outlet wishing to publish the story was permitted to do so only if they did not contact the Farnells, Mrs Chanbua, or their families; they were required to use only file footage as part of any story; and if the Farnells or Mrs Chanbua wish to comment, they could make contact with the media directly, in which case their comments could be published: [742]. Media organisations were also encouraged, but not required, to state in the report that the full judgment of the Court can be found at <www.familycourt.wa.gov.au>.

[138] *Australian Securities and Investments Commission v Rich* (2003) 181 FLR 181; [2003] FamCA 1114.

[139] The authors have been unable to locate a copy of the order but its existence was referred to in an ASIC media release (ASIC, "Family Court Lacks Jurisdiction to Set Aside Rich Financial Agreement" (Media release 03-350, 4 November 2003)

Court lists

(da) the publication by the court of lists of proceedings under this Act, identified by reference to the names of the parties, that are to be dealt with by the court;

This exception must be considered in the context of s 121(2), reproduced above, which makes it an offence to publish a list of proceedings under the *Family Law Act* that are to be dealt with by a court, that is identified by reference to the names of the parties. Two exceptions are contemplated in s 121(2) itself: the Rules of Court can permit the publication of lists containing actual names, and notices with actual names can be displayed in the premises of the court. The *Family Law Rules 2004* (Cth) do make provision for the publication of lists. Rule 1.20 provides that a list of cases to be heard in the Family Court, prepared by a Registry Manager, may be published in the law list in a newspaper and made available to members of the legal profession and their employees.[140] The list may contain: the family name of a party, but not a given name (unless it is a case in which a court has jurisdiction in bankruptcy under ss 35 or 35B of the *Bankruptcy Act 1966* (Cth), in which case the list may contain a party's given name); the file number of a case; the name of the judicial officer for a hearing or trial; the time and place where a named judicial officer will sit; and the general nature of an application.

The exception in s 121(9)(da) was initially confined to the display by the court of a notice in the premises of the court. In 2003 it was amended to its present form, which simply reads "the publication by the court of lists of proceedings under this Act".[141] This is wider than the two exceptions that appear in s 121(2), as it permits family courts to display lists of proceedings which contain the real names of the parties "on the premises of the court, or publish such a list in the newspaper or on the courts' internet sites".[142] It also ensures that the publication of such details does not contravene s 121(1).

In practice, the Family Court no longer publishes lists in newspapers, but both the Family Court and the Federal Circuit Court post daily lists on their website and in the court precinct.

Publication for professional use

(e) the publishing of any publication bona fide intended primarily for use by the members of any profession, being:
  (i) a separate volume or part of a series of law reports;[143] or
  (ii) any other publication of a technical character;

The reference to "any profession" would encompass the medical and legal profession, accountants, psychologists and social workers etc.

This exception was inserted before the advent of the internet and is therefore quite dated. At that time, reported judgments were available only in hard copy in bound volumes of law reports which were most likely to be found only in university and State libraries, legal offices and barristers' chambers. It was considered that the publication of identifiers in these reports would not seriously infringe the privacy of family law participants because of the unlikelihood that they would be read by members of the public. Unreported judgments were held by the court and could be obtained only from the parties, the court file or through the court library. Accordingly, they also enjoyed a practical obscurity.

In 1996, the Australasian Legal Information Institute (AustLII) began to post judgments on the internet. The advent of the internet also made it possible for the Family Court to upload its judgments

<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2003-releases/03-350-family-court-lacks-jurisdiction-to-set-aside-rich-financial-agreement> and discussed on ABC Radio National, "Transferring Assets between Spouses; Privacy and the Courts", *The Law Report*, 18 November 2003.

[140] Rule 1.05(3) of the *Federal Circuit Court Rules 2001* (Cth) provides for those *Family Law Rules* set out in Sch 3 Pt 1 to apply to family law or child support proceedings heard in the Federal Circuit Court. Rule 1.20 of the *Family Law Rules 2004* (Cth) is specifically mentioned in this Schedule. Rules 12, 13 and 13A of the *Family Court Rules 1998* (WA) allow for the adoption of the *Family Law Rules 2004* either in full or in modified form.

[141] *Family Law Amendment Act 2003* (Cth).

[142] Explanatory Memorandum, *Family Law Amendment Bill 2003* (Cth) Item 32.

[143] The two main series of law reports are the Family Law Cases and Family Law Reports.

on its own website. McCall recounts some uncertainty at the time as to the application of the exception in s 121(9) to judgments posted on the internet.[144] Although judgments that are published on the internet are clearly not "a separate volume or part of a series of law reports", they may be aptly described as publications "of a technical character". Whether they come within the exception in paragraph (e) will therefore depend on whether they are "bona fide intended primarily for use by the members of any profession".[145] On the one hand it might be argued that the rationale for publishing family law judgments on the internet is to make them accessible to the general public, thereby enabling them to become more appraised of the work of the family courts. On the other hand, the reality is that judgments are most likely to be read by members of the legal profession.

The Family Law Council considered the position to be unclear. However, since the Council considered that it would be "a retrograde step" to confine access to family law judgments to hard copies of judgments in bound series of law reports,[146] it recommended that s 121(9) be amended to clarify that judgments of the court made available in other than hard copy also fall within the exception. This recommendation was never acted upon.

The issue of whether family law judgments that are accessible on the internet come within the exception in s 121(9)(e) is no longer a live issue.[147] In deference to the principle of open justice, and in view of the paucity of information about the workings of the Court,[148] the Family Court decided to publish its judgments but to anonymise them in order to comply with s 121. For a number of years, the Family Court published only a select few judgments,[149] mainly judgments of the Full Court, as these were of greater jurisprudential value and of significant public interest.[150] This practice cemented the Family Court's reputation for being a secretive court.

In 2007 the Family Court adopted a new approach to the publication of its judgments. In recognition of the importance of the accessibility of its judgments to the public, it began publishing all of its final judgments online, both first instance and appellate, except those that are subject to a non-publication order.[151] All cases are anonymised[152] prior to publication and the case is then published on the AustLII website to which there is a link from the Court's website. Recent decisions are also published in the Court's website for a period of two months.[153] The Court separately preserves an unanonymised version of the judgment. The anonymisation is carried out by the Court's Judgments Publication Office staff.[154] The parties are given pseudonyms[155] and staff remove any

[144] IWP McCall, *Publicity in Family Law Cases*, Report to the Attorney-General for the Commonwealth on Proposals for Amendments to Family Law Act Section 121 (April 1997) 20–21.

[145] There is a recent suggestion that a blog posted by the Insolvency Practitioners Association of Australia which discussed a family law judgment in terms that disclosed the name of the wife might be regarded as a publication of a technical character: *Debrossard v AB Commission* (2016) 22 DCLR(NSW) 260; [2016] NSWDC 109, [23].

[146] See McCall, n 144, 21.

[147] It should be noted, however, that the exception is not confined to judgments, so may have scope for operation where a family court case is discussed in technical publications such as academic journals.

[148] Lyn Newlands, "Lifting the Veil – the Changing Face of Judgments Publishing in the Family Court of Australia" (2009) 17(4) *Australian Law Librarian* 250 <http://www.researchgate.net/publication/267709791_Lifting_the_veil__the_changing_face_of_judgments_publishing_in_the_Family_Court_of_Australia>.

[149] Around 150–200 judgments per year were published: Newlands, n 148, 251.

[150] Newlands, n 148, 251.

[151] Newlands, n 148, 252.

[152] This term is used to encompass pseudonyms.

[153] <www.familycourt.gov.au>.

[154] For a detailed description of the anonymisation principles, options and pitfalls, see Lyn Newlands, "Publishing Family Court Judgments: Problems and Solutions" (Paper presented at Law Via Internet 2015, Sydney, 10–11 November 2015) 6 <http://www.lvi2015.org/programme/papers/LVI2015_Lyn_Newlands_Publishing_Family_Court_judgments_paper.pdf>.

[155] Letters used to be used, but proper pseudonyms are easier to remember and also avoid the problem of duplication. The chosen pseudonyms start with same initials as the parties' real names, are of similar length, culturally appropriate and generally of similar ethnicity: Newlands, n 153, 6.

information (including contextual information) that might lead to identification of the parties and their children, without disturbing the integrity of the judges' reasons.[156] It is a very resource-intensive process. Commercial publishers decide which judgments they wish to include in formal law reports, but since they only receive the judgment in the anonymised form, they no longer need to rely on the exception in s 121(9)(e). Anonymisation facilitates media reporting because journalists do not have to fear breaching s 121; the work of de-identification has already been done.[157]

The Federal Circuit Court has a different approach. Not all of their family law judgments are published on the AustLII database, and the authors understand that those judgments selected for publication are anonymised by a computer program that extracts key identifiers, as the Court lacks the resources to employ staff to do the anonymisation manually.

Account of proceedings to professionals, parties to proceedings or students

> (f) the publication or other dissemination of an account of proceedings or of any part of proceedings:
>
> (i) to a person who is a member of a profession, in connection with the practice by that person of that profession or in the course of any form of professional training in which that person is involved; or
>
> (ia) to an individual who is a party to any proceedings under this Act, in connection with the conduct of those proceedings; or
>
> (ii) to a person who is a student, in connection with the studies of that person;

There is an increasing number of people who represent themselves in family law proceedings. Section 121(9)(f)(ia) enables self-represented litigants to obtain information that would assist them in the conduct of their proceeding.[158]

Approved accounts of proceedings

> (g) publication of accounts of proceedings, where those accounts have been approved by the court.

Section 121(9)(g) was inserted into the *Family Law Act* by the *Family Law Amendment Act 2003* (Cth). The Explanatory Memorandum to that Act makes the following statement about this provision:

> 201. Item 33 clarifies that the publication of accounts of proceedings, which have been approved by the court, does not contravene the general restriction on publication of court proceedings in section 121. This means, for example, that the court may approve that accounts of proceedings can be published on the courts' internet sites, on other internet sites, or in the courts' annual reports.

This suggests that the family courts could permit the wholesale publication of their judgments on the internet, complete with identifying particulars. This seems unlikely and has not been tested, since, as explained above, the Family Court has chosen to anonymise all of its judgments prior to uploading them to the internet. Interestingly, the anonymised Family Court judgments generally contain the following statement:

> It is noted that publication of this judgment by this Court under the pseudonym [pseudonym inserted] has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

If a judgment is properly anonymised, this statement should not be necessary, as there is no breach of s 121 and therefore no need for reliance on the exemption in s 121(9)(g). It is understood that the Family Court inserts this statement as a way of alerting the parties and interested media to the fact that the judgment has been anonymised and is therefore compliant with s 121. It may also cover the Court in the event that, through an oversight, an identifying particular has not been removed.

As explained above, courts treat s 121(9)(g) as having a significant overlap with s 121(9)(d) and frequently appeal to both exceptions when approving the publication of identifying particulars. However, the two exceptions are quite differently worded and the family courts could have been more

[156] This means redacting addresses, workplaces, schools etc.

[157] Many other courts have adopted a practice of not including personal information – though not names – from their judgments in order to reduce the impact on litigants' privacy and to avoid identity theft: Debra Mullins, "Update on 'Judicial Writing in an Electronic Age' – Five Years On" (Paper presented at the South Australian Judicial Development Day, Adelaide, 3 December 2009) <http://archive.sclqld.org.au/judgepub/2009/mullins031209.pdf>.

[158] Explanatory Memorandum, *Family Law Amendment Bill 2000* (Cth).

pedantic about what is required to fall within each one. For example, s 121(9)(d) might have been interpreted as applying in a scenario in which the court is taking the initiative and directing the publication of a notice or report, whereas s 121(9)(g) could have been reserved for situations where a family court has been approached by a person – usually a media organisation – requesting the court's permission to publish its own account of proceedings.

CONCLUSION

This article has analysed s 121 clause by clause. Such a detailed examination of the section has not been attempted since the publication of the McCall Report.[159] In the process it has exposed the complexities and, at times, ambiguities of the section, which makes it difficult to interpret and creates the potential for inconsistent results.

In addition to discussing the intricacies involved in interpreting and applying s 121, this article has uncovered some of the problematic issues which publishing in the electronic age raises, whereby individuals can disseminate information at the push of a button and reach all those with an internet connection. Essentially, s 121 was conceived and drafted in an age where the publishing and reporting of court proceedings was disseminated in hard copy. This is no longer the case. The 20-year hiatus since the publication of the McCall Report has witnessed a rapid growth in electronic publishing and a corresponding decline in traditional paper publishing. Over this period, fringe amendments purporting to deal with electronic publishing and reporting have been made to s 121, but, as discussed in this article, it is difficult to draft legislation to contain the ubiquitous internet, which, in turn, makes it difficult to maintain the integrity and purpose of the section.

It is hoped that this article will assist those who report on the work of the family courts, whether in a professional capacity or otherwise, to understand the limits of what they can and cannot communicate, albeit with some persistent uncertainties. It is anticipated that this article will also boost awareness of the challenges which the internet has spawned and the difficulties encountered in restricting the reporting and publishing of court proceedings to non-identifying information. Perhaps the time is ripe for an in-depth examination of s 121 with the view to amending the legislation to take account of the internet and its vast and indiscriminate audience.

[159] McCall, n 144.